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Swift, Modest Proposals, Babies, and Bathwater: Are Hibbitts's Writes Right?

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SWIFT, MODEST PROPOSALS, BABIES, AND BATHWATER: ARE HIBBITTS'S *WRITES* RIGHT?

by

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Bernard Hibbitts's *Last Writes?*[1] piece makes me uncomfortable. Not uncomfortable to the point of disagreement, mind you, because he's dead right: Internet technology would permit replacement of our present system of communicating legal scholarship with a better one. We ought to work on that. We ought to work on it immediately.

That is one of the reasons I fidget a bit as I read *Last Writes?*. I think that doing what Hibbitts proposes — and more to the point, doing it well — will be rather more work than he lets on, and will be anything but immediate. It will be a difficult kind of work, the thorny, self critical kind that law schools generally avoid like the plague. While Hibbitts does an excellent job of outlining the possible objections to his "modest proposal," I think that he underestimates the tenacity of the existing culture. I also think he misses some of the value of the law review — not necessarily the value that it has at present, mind you, but value which is remembered or which was once sought but never attained. My other reason for fidgeting is that I am not ordinarily the one to advocate caution in such things, but in this case I think some care is indicated.

The status quo is as Hibbitts sketches it. The law review system is a runaway machine which is overloaded with raw material and stoked like mad by the self-interests of faculty and students. Hibbitts nods to the problem of professional recognition of electronically-published work, but he does not solve it; his pleas for recognition of work by younger faculty stop short of the kind of blunt articulation of the problem which is needed. Simply put, unless merit, tenure, and promotion committees begin to recognize and actively encourage electronic publication, electronic publication will not take place on a useful scale. "Younger faculty under significant pressure to publish," which as I take it is a delicate way of referring to people up for tenure, are great followers of what they perceive to be the collegial norm. So too are committees charged with keeping the gates of the profession, and scholars fearful of having their work appear in a medium which has a pervasive reek of accessibility and immediacy about it.

Hibbitts rightly points out that both faculty committees and Deans can "positively intervene" in this process, and indeed they should. But Deans are

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1. Bernard J. Hibbitts, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace* (version 1.0, Feb. 5, 1996), <http://www.law.pitt.edu/hibbitts/last/htm>.

not provosts, and to accomplish such positive intervention they must be willing to take the further step of justifying themselves to the larger bodies of which most law schools are a part. Deans and others already encounter a species of clear-air turbulence when flying by the tenure requirements imposed by their parent universities, owed largely to the fact that J.D.s are not PhD.s, and journal articles are not books. It may be that provosts and universities are already quite comfortable with contemporary scholarly-publishing models used in the sciences (which, incidentally, Hibbitts describes quite well) and are willing to apply those models to their faculties of law. It may also be that harmonization of these requirements is a far more knotty problem in which law faculties are not the ultimate masters of their own fate.

Now there's a happy phrase, and one which is a cornerstone of Hibbitts's fundamentally faculty-centric evangelism. Under a self-publication model, he seems to be saying, faculty can write about what they want, when they want to, and in whatever way they wish, without unwarranted interference. Where I suspect that he and I might differ is on the amount of interference that is warranted.

Simply because student editing at law reviews has been reduced to a technical exercise in proof correction, bluebooking, and footnote footwork carried out by the sort of folks one imagines peering from beneath green eyeshades does not mean that no editing is needed. I suspect that the precirculation to colleagues Hibbitts advocates will not carry the whole weight of this process. There is no question that the relationship between author and editor can be an edgy one, whether we're talking about legal scholarship or not. There is a long history, again well-sketched by Hibbitts, of attempts to redress the imbalances of power surrounding that relationship at a law review, and which are of course derived from the relative status of faculty and students. This is not unlike rearranging deck chairs on the Titanic; faculty will inevitably feel, at least some of the time, that students are not qualified to edit their work, and students will inevitably demonstrate their independence by occasionally acting capriciously in accepting and reworking articles. None of this acting out is a reason to reject deeper editorial activity leading to an improved product, be it offered by other faculty or by professional editors (as seems to be the norm in some other disciplines). One might argue that the economic burden of hiring professional editors would reduce the number of law journals, but is that a bad thing?

This is a specific case of a more general problem in Hibbitts's proposals. He seems at times to be suggesting that if a thing is not being done well under the current regime it need not be done at all in future. (Considering his rejection of the educational value of the law review, a wag might suggest that Hibbitts intends that we follow the Swiftian implications of his "modest pro-

posal" to the endpoint and eat our own young). We are going to have to think carefully about providing electronic replacements for much more than the simple communication of scholarly work. So far as they go, Hibbitts's various proposed structures for replacing that part of law-review functionality are sound ones which have worked for others and could work for legal scholars as well. But much more is involved, especially for students: writing experience, institutional reputation, credentialling systems, and some useful functions which the print artifact provides that go beyond its ability to display information using ink and to provide a distribution pipe for the work of law faculty. I am not suggesting that Hibbitts is throwing out the baby with the bathwater; rather, the baby and the bathwater are so thoroughly homogenized in the current law-school culture that a fine and carefully constructed strainer is called for.

The replacement — perhaps more accurately the regeneration — of educational writing experiences for students is one area deserving attention. Hibbitts suggests a fostering of writing competitions. There are other models possible, including the electronic publication of casenotes (already underway here) and the publication of seminar papers in coherent, faculty-edited collections (already underway at Villanova and other places). Such efforts need to take place in parallel with a faculty move toward electronic publication, and they need to receive equal attention and effort from faculty. Such efforts are subject to the same kinds of criticism that have been directed at legal-writing curricula in general over the last several years, and it will take energy and faculty concern to implement them well.

Credentialing systems for students are more problematic. In part, the problem is one of nostalgia on the part of hiring partners in law firms. They are, after all, former law students, and they believe that the law review credential is of the same shape and size as it was in their heyday, largely because (though they may mentally correct for some 'nostalgia factor') they believe the present-day law review experience to be the same as it was then. Unfortunately, law schools stand to embarrass themselves should they choose to disabuse practitioners of this notion; it is never nice to admit that an institutional activity is not working as well as it once did. But to a greater or lesser degree that is precisely what law schools must do. It may be that law schools discover that a more candid approach will be appreciated, particularly by those in the profession who have been highly critical of law reviews in recent years. Alternatively, law schools might elect to abandon the credential by completely devaluing it as a presumptive meritocracy, moving to the all-volunteer scheme now used by several institutions, and perhaps directing the attention of the profession to the alternative student publication schemes briefly described above. Again, something must be done which goes beyond the abandonment of the review by its author pool.

As to credentialling systems for faculty, there are two levels of problem to be dealt with. I have already mentioned issues of culture and harmonization in the merit and promotion process. A second problem is the identification of particular articles with the place where they are published. This goes beyond the 'halo effect' mentioned by Hibbitts in at least two ways.

First, it is important to realize that some published, editorial selection of articles in particular areas will be undertaken by third parties regardless; this is the nature of the Web. Once there is a mass of self-published material on the Net, someone will inevitably publish a list of pointers to his or her favorite articles in some particular substantive area. The importance of such a "pick list" will, of course, vary greatly with the esteem in which the picker is held. For that matter, it is possible that the picker will not be a legal scholar or even a person at all; it might be an anonymous editorial board or some other corporate fiction. One imagines such lists being published rather in the way that the *US News & World Report* rating of law schools is currently undertaken — perhaps a selection or rating of scholarly work by (for instance) the *American Lawyer*. While Hibbitts points out that such systems may arise spontaneously, he stops short of the realization that creating them by design is probably more desirable than having them occur by accident.

Second, the role of the law review as validator and its incarnation as print artifact overlap in an interesting way. People find it convenient, at least for browsing purposes, to have a selection of articles appear listed in a single place, just as they have always done in print. There are some benefits to authors (particularly new authors) when they do so. Part of the work of a quality journal has been to take meritorious articles whose authors or topics are relatively unknown to the larger audience and place them where that audience will fall over them (whether this has actually been done or not is another matter). It is arguable whether this can happen when the list of articles is produced not by editors but by a search engine driven by the reader's own choice of terms; much depends on how well-crafted the search is, and on the degree to which the undiscovered and unsuspected article shows characteristics which match that search. The experience of the Net thus far would indicate first that the quality of search-engine output is not that good and second that people like the intellectual and practical convenience of editorially-selected, topically focused collections of links to information. The result may be a sort of 'halo effect', but that's inescapable as long as readers want the convenience and potential for discovering new information which is offered by this kind of co-location.

A second element of print which may be worth preserving is some notion of "issues," that is, of a static selection of articles linked to some point in time. While Hibbitts seems to feel that issues are simply an artifact left by the

economics of print distribution, readers rely on them in at least two ways. First, they serve as a kind of checkpoint; there are conditions under which the issue-as-block-of-articles is an easier thing to manage than an ad-hoc information stream (for example, in remembering what one has and has not read). Second, they provide a token of exchange; experience indicates that in situations where people pay for a subscription, they are more comfortable with the predictability of the "issue" format as a kind of regular return on their investment. This at least in part explains why the transmogrified "electronic journals" have tried to retain it. It also argues that some relatively sophisticated personal information-management tools are going to be needed if the "issue" format is to be replaced. Readers will want to replace static lumps of print with organized snapshots of the state of a particular literature or interest in ways which are not well supported by search engines or simple electronic book marking.

The actor most likely to construct a concentrated collection of links of either type discussed above is the law school itself. One may argue that law reviews no longer "communicate the work of the school" as Harvard's first effort did, since little of the work in some law reviews is actually generated by the faculty of that school, but there is no doubt that the world strongly identifies the journal with the school and vice versa. Hibbitts refers to this as a kind of incidental prestige, but I think it important enough that law schools will act quickly to replace it. To some extent they already have; the number of Web pages used by law schools to show themselves to others has risen enormously in the last year. But these brochures — for that is what they are — cannot and do not do much to communicate directly the intellectual nature of the place. That may be something which is best done by the showcasing of more substantive work, very likely in the form of a page or two linking the work of faculty together as a kind of institutional showcase. As with other approaches to collecting self-published material, this may be the original occasion of sin or it may not. Such pages might well be edited by students eager both to communicate the work of the school and show some writing of their own to a wide audience, and so we begin again ....

Finally, a word on the political nature of technological change in law schools. I think Hibbitts is a trifle too dismissive of what he regards as the incidental aspects of the law-review regime, and this is a political as well as a substantive problem. Experience in advocating the kind of technological change which has serious impact on institutional activities forces me to the conclusion that it simply is not possible (at least in non-geologic time) unless all parties affected are convinced that they will lose nothing in the process. Nobody's ox may be gored, though it may well be an imaginary ox generated from nostalgia, or wishful thinking, or both, and though it may well in course

die neglected and unmourned. To that end we need to think hard about the value of law reviews as more than communicators of scholarly work, and see if that value can be replaced by other means under a new regime.

And that is very resonant of the Web, which is a powerful disaggregator of the means by which value is added to information. Though he may wax most lyrical when addressing faculty concerns, Hibbitts has made an excellent case for removing those parts of the law review which communicate scholarly work to a new venue. What are we to do with the rest?